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ABSTRACT

Competency testing often refers to a system devised to assure successful performance on a specific test, in addition to other mandated criteria as a requisite to obtaining a high school diploma. Minimum competency testing is usually defined in one of two ways: as the acquisition of basic skills or as the demonstrated ability to apply basic skills to everyday life situations. The latter definition seems to be the most popular one. This paper examines major litigation that has occurred in the area of testing. Legal standards are explained and analyzed with reference to measurement principles. A discussion of future directions in which law and evaluation may move and strategies that educators might employ to better educate the legal profession about evaluation follows. A 22-item bibliography concludes the document. (JMK)

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THE LAW AND COMPETENCY EVALUATION

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AMERICAN ASSOCIATION OF COLLEGES FOR TEACHER EDUCATION,
ANNUAL MEETING, SAN ANTONIO, TEXAS, FEBRUARY 3, 1984.

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TODAY, ONE DOES NOT HAVE TO LOOK BEYOND THE MORNING NEWSPAPER TO FIND A STATEMENT CRITICIZING THE SCHOOLS OR NOTING THE DETERIORATION OF EDUCATION IN THIS COUNTRY. AT THE SAME TIME THE ECONOMIC SYSTEM HAS INSTILLED IN MANY AN INSECURITY ABOUT THEIR OWN FUTURE: WILL THEY ATTAIN THE STEP ON THE CAREER LADDER TO WHICH THEY ASPIRE? BUT MORE IMPORTANT, WILL THEIR CHILDREN HAVE MEANINGFUL AND SUCCESSFUL CAREERS? JOBS WILL BE LIMITED WHEN THEIR CHILDREN HIT THE MARKET. COMPETITION FOR THE GOOD POSITIONS WILL BE FIERCE, FAR MORE DIFFICULT THAN WHAT MANY OF US HAVE ENCOUNTERED.

THIS OBSESSION WITH COMPETITION AND THE DESIRE FOR SUCCESS IS DOCUMENTED BY THE REPORTS OF PARENTS SELECTING DAY CARE CENTERS WITH AN EYE TO THE PROPER PREPARATION FOR ENTRY TO HARVARD. MANY OF THESE PARENTS BELIEVE THAT WASTING A THREE YEAR OLD'S TIME FOR SIX TO TWELVE MONTHS IN A DEPRIVED ENVIRONMENT COULD CLEARLY STYMIE HIS OR HER CHANCES TO COMPETE AT EIGHTEEN WITH THOSE CHILDREN HAVING BEEN SUBJECTED TO THE PERFECT DAY SCHOOL. AS PARENTS BECOME MORE SELECTIVE IN THEIR DECISION TO RAISE A CHILD AND ARE FORCED TO SACRIFICE CAREER OPPORTUNITIES AND LOST EARNINGS IN THAT ENDEAVOR, THEY ALSO TAKE A GREATER INTEREST IN MAPPING THE SUCCESSFUL FUTURE FOR EACH OF THEIR OFFSPRING.

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ALTHOUGH THE LITERATURE DOES NOT CONFIRM THE NOTION THAT SOCIETY POSSESSES ABOUT SCHOOL SUCCESS AND SUCCESS IN LIFE, MOST PERSONS BELIEVE THEIR CAREER SUCCESS OR FAILURE WAS ESTABLISHED IN THE SCHOOL ENVIRONMENT. THEY FURTHER BELIEVE THAT SUCCESS OR FAILURE WAS DETERMINED BY THE ASSESSMENT OF TEACHERS AND, ON OCCASION, BY THEIR CAPACITY TO DEAL WITH TESTS. AS COMPETITION INCREASES AND AS SOCIETY IS FORCED TO DEAL WITH THE MOST OBJECTIVE BASES POSSIBLE IN MAKING EMPLOYMENT DECISIONS THE IMPORTANCE OF MINIMUM COMPETENCY TEST RESULTS WILL INCREASE SIGNIFICANTLY. WITH THE PREMIUM PLACED ON THOSE RESULTS, PERSONS OBTAINING LOW SCORES WILL BEGIN TO EXAMINE THEIR LEGAL RIGHTS - MASSIVE LITIGATION COULD BE EMINENT.

YES, MEASUREMENT DEVICES OR TESTS AND THE DECISIONS MADE UPON THE RESULTS OF THE USE OF SUCH TESTS ARE FAIR GAME FOR LEGAL ANALYSIS. THE FIRST APPEARANCES OF TESTS IN THE COURTS WERE OVER ISSUES OF EMPLOYMENT. WHEN HIGHLY SUBJECTIVE EMPLOYMENT POLICIES WERE CHALLENGED, EMPLOYERS WERE FORCED TO SEARCH OUT TESTS UPON WHICH TO MAKE OBJECTIVE DECISIONS. IMMEDIATELY FOLLOWING THE CHALLENGES TO THE EMPLOYMENT TESTS WERE CHALLENGES TO THE SYSTEMS OF ASSESSEMENT USED IN CLASSIFYING CHILDREN AS HANDICAPPED. THE LITIGATION AFFECTED SPECIFIC, AND VERY IMPORTANT, MEMBERS OF SOCIETY BUT IT DID NOT DIRECTLY AFFECT ALL OF SOCIETY. TODAY, WE ARE ABOUT TO EMBARK ON A MASSIVE TESTING MOVEMENT WHICH WILL AFFECT NEARLY EVERY CHILD ATTENDING THE PUBLIC SCHOOLS OF THIS NATION. MINIMUM COMPETENCY TESTING HAS STATUTORY AUTHORITY OR IS UNDER CONSIDERATION IN NEARLY ALL STATES AND THE DISTRICT OF COLUMBIA.

COMPETENCY TESTING OFTEN REFERS TO A SYSTEM DEvised TO ASSURE SUCCESSFUL PERFORMANCE ON A SPECIFIC TEST IN ADDITION TO OTHER MANDATED CRITERIA AS A REQUISITE TO OBTAINING A HIGH SCHOOL DIPLOMA. MINIMUM COMPETENCY TESTING IS USUALLY DEFINED IN ONE OF TWO WAYS: AS THE ACQUISITION OF BASIC SKILLS OR AS THE DEMONSTRATED ABILITY TO APPLY BASIC SKILLS TO EVERY DAY LIFE SITUATIONS. THE LATER DEFINITION SEEMS TO BE THE MOST POPULAR ONE. TODAY WE WILL EXAMINE THE MAJOR LITIGATION THAT HAS OCCURRED IN THE AREA OF TESTING. LEGAL STANDARDS WILL BE EXPLAINED AND WILL BE ANALYZED WITH REFERENCE TO MEASUREMENT PRINCIPLES. THIS WILL BE FOLLOWED BY A DISCUSSION OF FUTURE DIRECTIONS IN WHICH LAW AND EVALUATION MAY MOVE AND STRATEGIES THAT WE AS EDUCATORS MIGHT EMPLOY IN ORDER TO BETTER EDUCATE THE LEGAL PROFESSION ABOUT EVALUATION.

HOBSON v. HANSEN¹ IS OFTEN MENTIONED AS THE FIRST COURT DECISION ON CLASSIFICATIONS BASED ON ACADEMIC ACHIEVEMENT OR ABILITY. IN ARRIVING AT THE DECISION THAT THE USE OF ACHIEVEMENT TEST SCORES TO PLACE STUDENTS IN VARIOUS ABILITY TRACKS WAS UNCONSTITUTIONAL THE COURT EVALUATED TEST COMPONENTS, AND EXAMINED DATA AND METHODOLOGY.

IN GRIGGS v. DUKE POWER CO.² ANOTHER EARLY SUPREME COURT DECISION, THE COURT FOUND THAT TITLE VII OF THE CIVIL RIGHTS OF 1964 PROHIBITED AN EMPLOYER FROM REQUIRING A HIGH SCHOOL DIPLOMA OR THE PASSING OF A STANDARDIZED TEST AS A CONDITION OF EMPLOYMENT WHEN THE STANDARD COULD NOT BE SHOWN TO BE SIGNIFICANTLY RELATED TO SUCCESSFUL JOB PERFORMANCE, WHEN IT SERVED TO DISQUALIFY BLACKS AT A SUBSTANTIALLY

1. HOBSON v. HANSEN 269 F. SUPP. 401, 1967.

2. GRIGGS v. DUKE POWER COMPANY. 401 U.S. 424, 1971

HIGHER RATE, AND WHEN A LONG STANDING PRACTICE OF JOB PREFERENCE TO WHITES HAD EXISTED.

LARRY P. v. RILES³ WAS AN ACTION BROUGHT BY BLACK STUDENTS CHALLENGING THE USE OF IQ TESTS IN PLACING CHILDREN IN SPECIAL CLASSES FOR THE EDUCABLE MENTALLY RETARDED. RILES, THE DEFENDANT, WAS THE SUPERINTENDENT OF PUBLIC INSTRUCTION FOR THE STATE OF CALIFORNIA. PLAINTIFF'S CONTENTION THAT THE IQ TESTS WERE BIASED WAS PREMISED ON THE FACT THAT BLACKS REPRESENTED TEN PERCENT OF THE STUDENT POPULATION OF CALIFORNIA AND TWENTY-FIVE PERCENT OF THE STUDENT BODY ENROLLED IN E.M.R. CLASSES.⁴ THE COURT HELD THAT THE USE OF A TEST WHICH HAD A DISPROPORTIONATE EFFECT ON BLACK STUDENTS VIOLATED THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT, TITLE VI OF THE CIVIL RIGHTS ACT, AND THE FOURTEENTH AMENDMENT OF THE CONSTITUTION. THE COURT ALSO ENJOINED THE USE OF THE TESTS UNTIL IT COULD BE SHOWN THAT THE TESTS WERE NOT RACIALLY OR CULTURALLY DISCRIMINATORY. CALIFORNIA STATUTE DID NOT MANDATE A SPECIFIC TEST; HOWEVER, THE WESHSLER WAS THE TEST MOST OFTEN MENTIONED IN THE DISCUSSION.

DEBRA P. v. TURLINGTON⁵ WAS A CLASS ACTION SUIT BROUGHT BY FLORIDA HIGH SCHOOL STUDENTS CHALLENGING THE CONSITUTIONALITY AND STATUTORY VALIDITY OF THE STATE STUDENT ASSESSMENT TESTS, PASSAGE OF WHICH WAS AND IS TODAY A PREREQUISITE TO OBTAINING A HIGH SCHOOL DIPLOMA. TURLINGTON WAS THE FLORIDA COMMISSIONS OF EDUCATION.

3. LARRY P. v. RILES, 495 F. Supp. 926 (1979).

4. Id. AT 931.

5. DEBRA P. v. TURLINGTON, 474 F. Supp. 244-248-249, (1979).

IN THE COMPLAINT FILED OCTOBER 16, 1978, PLAINTIFFS STATED THAT THE STUDENT ASSESSMENT TESTS VIOLATED THE FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION RIGHTS, TITLE VI OF THE CIVIL RIGHTS ACT AND THE U.S.C. § 1703, THE EQUAL EDUCATION OPPORTUNITIES ACT.

IN 1976, THE FLORIDA LEGISLATURE ENACTED THE EDUCATIONAL ACCOUNTABILITY ACT. THE INTENT OF THE ACT WAS TO ASSURE STUDENTS OF ALL LOCALITIES A COMPARABLE OPPORTUNITY FOR EDUCATIONAL ADVANCEMENT, TO ASCERTAIN THAT FLORIDA PUPILS WERE PROVIDED INSTRUCTIONAL PROGRAMS ADEQUATE TO ENABLE THEM TO MEET MINIMUM STANDARDS AND TO PROVIDE INFORMATION TO THE PUBLIC SUFFICIENT TO ALLOW THE PUBLIC TO KNOW IF STUDENTS WERE RECEIVING AN EDUCATION SUFFICIENT TO MEET THE STANDARDS. IN 1978 THE ACT WAS AMENDED TO REQUIRE PASSAGE OF A FUNCTIONAL LITERACY EXAMINATION IN ORDER FOR STUDENTS TO RECEIVE A HIGH SCHOOL DIPLOMA. SUCCESSFUL PERFORMANCE ON THE MINIMUM COMPETENCY FUNCTIONAL LITERACY TEST WAS ONLY ONE REQUIREMENT FOR THE HIGH SCHOOL DIPLOMA. THEY WERE ALSO REQUIRED TO COMPLETE A MINIMUM NUMBER OF CREDITS AND TO MASTER BASIC SKILLS. THE FLORIDA STATUTE REQUIRED THAT THE LITERACY TEST BE COMMON TO ALL STUDENTS WITHIN THE STATE AND THAT THE EXAMINATION ASSESS DEMONSTRATED ABILITY TO SUCCESSFULLY APPLY BASIC SKILLS TO EVERY DAY LIFE. IT SHOULD BE NOTED THAT A SIMILAR STATUTE WITH REGARD TO MINIMUM COMPETENCY HAS EXISTED IN CALIFORNIA BUT THE LOCAL SCHOOL DISTRICT HAS BEEN PERMITTED TO CREATE THE ASSESSMENT TOOL. IT APPEARS THAT THE LOCAL SCHOOLS HAVE RETAINED THAT AUTHORITY IN CALIFORNIA'S NEW EDUCATIONAL REFORM ACT OF 1983.

AT THE TIME OF THE DEBRA P. TRIAL THE FLORIDA STUDENT ASSESSEMENT TEST HAD BEEN ADMINISTERED THREE TIMES: FALL 1977, FALL 1978 AND SPRING 1979. FAILURE RATE WAS THIRTY-SIX PERCENT. OF THE THIRTY-SIX PERCENT FAILURE BLACKS CONSTITUTED SEVENTY-EIGHT PERCENT WHILE ONLY TWENTY-FIVE PERCENT OF THE WHITES FAILED. AS THE FAILURE RATE DECREASED THE PROPORTION OF FAILURE TO SUCCESS BETWEEN BLACKS AND WHITES REMAINED THE SAME.

FUNCTIONAL LITERACY WAS DEFINED AS THE SATISFACTORY APPLICATION OF BASIC SKILLS IN READING, WRITING AND ARITHMETIC TO PROBLEMS AND TASKS OF A PRACTICAL NATURE AS ENCOUNTERED IN EVERYDAY LIFE. TWENTY-FOUR SKILL OBJECTIVES WERE IDENTIFIED. THE 1977 CRITERION REFERENCED TEST CONTAINED ONE HUNDRED AND SEVENTEEN QUESTIONS DESIGNED TO ASSESS MASTERY OR COMPETENCE IN THE TWENTY-FOUR SKILL OBJECTIVES.

PLAINTIFFS CLAIMED THAT THE TEST PERPETUATED AND RE-EMPHASIZED THE EFFECTS OF PAST PURPOSEFUL DISCRIMINATION; THUS DENYING EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT. THEY ALSO STATED:

- 1) THAT THE TEST WAS UNRELIABLE, INVALID AND NOT CORRELATED TO THE PUBLIC SCHOOL CURRICULUM, AND
- 2) THAT THE TEST INSTRUMENT WAS RACIALLY BIASED.

WHILE THERE MAY HAVE BEEN NO INTENT TO DISCRIMINATE, THE DISPROPORTIONATE IMPACT OF THE DIPLOMA DENIAL ON BLACK STUDENTS IMPOSED BY FAILURE ON THE STUDENT ASSESSMENT TEST WAS CLEAR.

THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA HELD THAT THE TEST HAD ADEQUATE CONTENT AND CONSTRUCT VALIDITY, BORE A RATIONAL RELATION TO A VALID STATE INTEREST, AND THAT THE USE OF THE TEST TO CLASSIFY STUDENTS FOR REMEDIATION WAS CONSTITUTIONALLY PERMISSIBLE. AS A RESULT OF THE LONG HISTORY OF DESEGREGATION THE TESTS WERE FOUND TO DISCRIMINATE AGAINST THE BLACKS, VIOLATING THE EQUAL PROTECTION CLAUSE, AND AS A RESULT OF THE INADEQUACY OF NOTICE PROVIDED PRIOR TO DIPLOMA SANCTION THE STATE WAS ENJOINED FROM REQUIRING PASSAGE OF THE TEST AS A GRADUATION REQUIREMENT FOR A PERIOD OF FOUR YEARS. AT THE END OF THE FOUR YEARS ALL GRADUATES OF THE FLORIDA SCHOOLS WOULD HAVE SPENT THEIR ENTIRE SCHOOLING IN A DESEGREGATED SETTING.

ON MAY 4, 1981 THE CASE WAS SENT TO THE FIFTH CIRCUIT COURT OF APPEALS.⁶ LEGAL ISSUE OF THE APPEAL WAS "WHETHER THE STATE OF FLORIDA COULD CONSTITUTIONALLY DEPRIVE PUBLIC SCHOOL STUDENTS OF THEIR HIGH SCHOOL DIPLOMA ON THE BASIS OF AN EXAMINATION WHICH MAY COVER MATTERS NOT TAUGHT THROUGHOUT THE CURRICULUM." THE COURT FOUND, BASED UPON THE FACTS PRESENTED, THAT PROOF WAS INSUFFICIENT TO DOCUMENT WHETHER THE TEST COVERED THE MATERIALS ACTUALLY STUDIED IN THE CLASSROOM. IF A TEST COVERS MATERIALS NOT TAUGHT, IT IS UNFAIR AND VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE CONSTITUTION. THE COURT HELD THAT THE STATE MAY NOT CONSTITUTIONALLY SO DEPRIVE STUDENTS UNLESS IT HAS SUBMITTED PROOF OF THE CURRICULAR VALIDITY OF THE TEST. THEY VACATED THE JUDGMENT OF THE DISTRICT COURT AND REMANDED FOR FURTHER FINDINGS OF FACT.

ON REMAND THE STATE WAS REQUIRED TO PROVE THAT THE MATERIALS TESTED WERE MATERIALS COVERED IN CLASS. THE FIFTH CIRCUIT HELD "THAT THE STATE MAY NOT DEPRIVE ITS HIGH SCHOOL SENIORS OF THE ECONOMIC AND EDUCATIONAL BENEFITS OF A HIGH SCHOOL DIPLOMA UNTIL IT HAS DEMONSTRATED THAT THE STUDENT ASSESSMENT TEST IS A FAIR TEST OF THAT WHICH IS TAUGHT IN ITS CLASSROOMS AND THAT THE RACIALLY DISCRIMINATORY IMPACT IS NOT DUE TO THE EDUCATIONAL DEPRIVATION IN THE 'DUAL SCHOOL' YEARS."

THE SEPTEMBER 4, 1981 PETITION FOR REHEARING WAS DENIED. QUESTIONS RAISED HINTED AT THE PROPERTY RIGHT OF A HIGH SCHOOL DIPLOMA. THE THINKING BEING THAT IF A STUDENT EXPECTS A HIGH SCHOOL DIPLOMA UPON COMPLETION OF SO MUCH WORK THERE IS A PROPERTY RIGHT IN THAT EXPECTATION. IF A STATE REQUIRES A COMPETENCY TEST, THAT TEST MUST BE A FAIR TEST OF MATERIAL PRESENTED WITHIN THE REQUIRED COURSES.

ON MAY 4, 1983,⁷ THE REQUEST TO CONTINUE THE INJUNCTION AGAINST USING THE MINIMUM COMPETENCY TEST AS ONE CRITERIA FOR AWARING A FLORIDA HIGH SCHOOL DEPLOMA WAS DENIED. THAT INJUNCTION CONTINUED UNTIL 1983 WHEN THE STATE OF FLORIDA WAS ALLOWED TO DENY DIPLOMAS TO MEMBERS OF ITS MOST RECENT GRADUATING CLASS WHO HAD NOT PASSED THE STUDENT ASSESSMENT TEST.

WHILE NO OTHER MAJOR CASE IS CURRENTLY IN THE COURTS, IT IS ANTICIPATED THAT CONSIDERABLE LITIGATION WILL OCCUR AS THE STATUTES ARE CHALLENGED IN THE VARIOUS STATES.

7. DEBRA P. v. TURLINGTON, No. 78-89 2-(MD FLORIDA) 1983.

WHAT ARE THE LEGAL ISSUES AND PROBLEMS THAT WILL BE ENCOUNTERED IN THE AREA OF EVALUATION?

THE LEGALITY OF A TESTING PROGRAM WILL TEND TO DEPEND UPON THE USE OF THE TEST RESULTS RATHER THAN UPON THE TEST ITSELF. IF THE TEST RESULTS ARE USED IN SUCH A WAY THAT SOME ONE IS HURT, THE INJURY WILL TRIGGER A LEGAL ANALYSIS.⁸ RESULTS OF THE ANALYSIS WILL DETERMINE WHO IS RESPONSIBLE FOR THE INJURY AND WHETHER THE PERSON OR AGENCY HAS SUFFICIENT JUSTIFICATION FOR CAUSING SUCH AN INJURY. ALTHOUGH DENIAL OF A DIPLOMA IS A MOST SERIOUS INJURY, FAILURE TO PROMOTE OR TRACK A STUDENT MIGHT ALSO INFLECT HARM.

A SECOND LEGAL ISSUE IS WHETHER THE COURT WILL REFUSE TO REVIEW COMPETENCY TESTING PROGRAMS BECAUSE THEY INVOLVE EVALUATION OF ACADEMIC PERFORMANCE. COURTS HAVE BEEN HESITANT TO QUESTION THE ADEQUACY OF EDUCATIONAL PROGRAMS OR THE VALIDITY OF PROFESSIONAL JUDGMENTS ABOUT ACADEMIC PERFORMANCE. COMPETENCY TESTING, WITH ITS RELIANCE ON SPECIFIED GOALS AND OBJECTIVES, TEST SPECIFICATIONS, AND ITEMS KEYED TO SPECIFICATIONS APPEARS TO HAVE PROVIDED THE COURT STANDARDS ADEQUATE TO ENABLE THE COURTS TO RENDER JUDGMENT. THESE EXPLICIT DIRECTIONS PROVIDE THE COURT A ROAD MAP TO ENABLE THEM TO CARRY OUT THE TASK. WITH THE STANDARDS FOR ACADEMIC PERFORMANCE CLEARLY IDENTIFIED THE COURTS WILL NO LONGER BE HESITANT TO ENTER THE ACADEMIC DOMAIN. THE FACT IS THAT OUR THOROUGH PREPARATION HAS ENABLED THE COURTS TO MAKE USE OF OUR STATEMENTS AS TESTS UPON WHICH TO RENDER JUDGMENT.

8. GUNN, LEE D. "DEBRA P. v. TURLINGTON: DUE PROCESS ENTERS THE CLASSROOM, BUT HOW FAR?" "JOURNAL OF LAW AND EDUCATION (1982)

SO FAR MOST COURT DECISIONS IN THE AREA OF TESTING HAVE CONCERNED THE AWARDING OF HIGH SCHOOL DIPLOMAS OR THE SOCIAL AND LINGUISTIC DISCRIMINATION STANDARDS FOUND IN THE EMPLOYMENT AND HANDICAPPED AREAS. IN THE FUTURE SUCH ISSUES AS VALIDITY, RELIABILITY, ASSUMPTIONS ABOUT LEARNING AND CONTENT WILL BECOME TOPICS FOR THE COURTS. THE WHOLE AREA OF EDUCATIONAL MALPRACTICE WILL BE CLOSELY TIED TO THE COMPETENCY TESTING ISSUES. COMPETENCY TEST RESULTS WILL EASILY IDENTIFY LOCATIONS WHERE MALPRACTICE MAY EXIST.

WILL TEST CONTENT BE SUBJECTED TO LEGAL ANALYSIS?

MCCLUNG⁹ STATES THAT "TESTS WILL BE LEGALLY VULNERABLE IF THEY INCLUDE ITEMS THAT INVOLVE 1) COERCED BELIEF, 2) INVASION OF PRIVACY, 3) UNTEACHABLE OR UNMEASUREABLE CONTENT, 4) CONTENT THAT IS NOT SUFFICIENTLY MATCHED WITH A SCHOOL'S CURRICULUM AND INSTRUCTION, AND 5) CONTENT THAT IS CULTURALLY BIASED." TESTS THAT ATTEMPT TO MEASURE THE AFFECTIVE DOMAIN WILL BE QUESTIONED AS TO THEIR CAPACITY TO MEASURE SUCH A DOMAIN. OTHERS QUESTION THE ABILITY TO TEACH IN SUCH A DOMAIN. IF THE AFFECTIVE DOMAIN IS TO BE MEASURED, QUESTIONS MUST BE PHRASED FROM A KNOWLEDGE STANDPOINT AND NOT BASED ON OPINIONS.

WHAT WILL THE LEGAL ANALYSIS BE?

LEGAL PROVISIONS WHICH MAY PROVE IMPORTANT TO ASSESSMENT PROGRAMS ARE FOUND IN FEDERAL AND STATE CONSTITUTIONS; LAWS, POLICIES, RULES AND REGULATIONS OF STATE EDUCATION AUTHORITIES; AND COMMON LAW, THE RESULTS OF COURT CASES. AMONG THE CONSTITUTIONAL PROVISIONS, THE FOURTEENTH AMENDMENT IS MENTIONED MOST OFTEN.

9. MCCLUNG, MERLE STEVEN. "COMPETENCY TESTING PROGRAMS: LEGAL AND EDUCATIONAL ISSUES." 47 FORDHAM LAW REVIEW (1979) p. 9

WHAT WILL THE FOURTEENTH AMENDMENT REQUIRE OF A
TEST AND OF THE USE OF THE TEST DATA?

DUE PROCESS

THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION PROVIDES THAT NO STATE SHALL "DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW." DUE PROCESS MAY BE EXAMINED FROM EITHER A SUBSTANTIVE OR PROCEDURAL ASPECT. A DUE PROCESS VIOLATION REQUIRES THAT A PERSON BE DEPRIVED OF LIBERTY OR PROPERTY AS A RESULT OF THE ACTION OF THE STATE.

SUBSTANTIVE DUE PROCESS REQUIRES THAT THE ACTIONS OF THE STATE BE RATIONAL AND REASONABLY RELATED TO A LEGITIMATE STATE INTEREST. IF THE ESTABLISHMENT OF A HIGH STANDARD IN AWARDING A HIGH SCHOOL DIPLOMA IS A LEGITIMATE STATE INTEREST AND IF THE TOOL USED TO ASSESS THAT STANDARD IS THE BEST MEASURE AVAILABLE, THE HIGH SCHOOL DIPLOMA MAY BE DENIED TO THOSE NOT REACHING THE STANDARD. IF THE ASSESSMENT TOOL MEASURES MATERIALS WHICH HAVE NOT BEEN TAUGHT, STUDENTS COULD ASSERT A VIOLATION OF THEIR SUBSTANTIVE DUE PROCESS. IF AUTHORITIES CAN DEMONSTRATE THAT MORE RELIABLE OR VALID ASSESSMENT TOOLS EXIST THAN THOSE SELECTED IN A PARTICULAR SETTING, STUDENTS WILL BE ABLE TO ASSERT A VIOLATION OF THEIR SUBSTANTIVE DUE PROCESS.

PROCEDURAL DUE PROCESS WILL ALLOW STUDENTS TO CHALLENGE THE RESULTS OF THE TESTING, CONTENTS OF THE TEST, OR HOW THEIR SCORES WERE DERIVED. A TEST SHOULD BE VALID AND RELIABLE; IT SHOULD MEASURE WHAT IT PURPORTS TO MEASURE AND MEASURE IT ACCURATELY. A TEST

MUST BE CONSIDERED "FAIR." THE INSTRUMENT WILL HAVE TO MEET THE BEST PRACTICE STANDARD AMONG MEASUREMENT EXPERTS. IF THE TEST IS SHOWN TO BE ARBITRARY AND UNREASONABLE, THE COURTS WILL BE COMPELLED TO INVALIDATE IT. THE GOAL OR REASONS FOR CREATING THE TESTING PROGRAM SHOULD ALSO BE THOROUGHLY EXAMINED.

THE DICTATES OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS ARE LEGAL ELEMENTS THAT ALL PERSONS ENGAGED IN TEST CONSTRUCTION WILL NEED TO UNDERSTAND. ALTHOUGH A SOUND TESTING PROTOCOL REQUIRES THESE ELEMENTS, TEACHERS MUST RECOGNIZE THEIR LEGAL AS WELL AS THEIR MEASUREMENT SIGNIFICANCE. WHETHER TESTS SHOULD BE CONSTRUCTED AT THE LOCAL OR THE STATE LEVEL WILL BE A DIFFICULT ISSUE. STATE LEVEL MEASUREMENT TOOLS WILL ENSURE CONSISTENCY. IF STATE CREATED TESTS GUARANTEE MEASUREMENT OF PRECISELY WHAT HAS BEEN TAUGHT, THE SCHOOLS WILL HAVE MOVED INTO A PRESCRIPTIVE APPROACH TO LEARNING AND TO EDUCATION. WE WILL HAVE TAKEN A GIANT STEP TOWARD A UNIFORM PROGRESSION IN THE SCHOOLS. GIVEN THIS SITUATION HOW WILL WE CHOOSE TO DEAL WITH INDIVIDUALIZED INSTRUCTION AND THE NEEDS AND EXPECTATIONS OF THE LOCAL COMMUNITY? WILL A FEAR OF LITIGATION DISCOURAGE THE GREAT STRIDES WE, AS AN ORGANIZATION, ARE MAKING IN THE PRACTICAL APPLICATION OF LEARNING THEORY?

IN ORDER FOR DUE PROCESS TO FUNCTION, STUDENTS MUST HAVE ADEQUATE NOTICE OF THE TEST AND OF WHAT IS EXPECTED OF THEM ON THE TEST. A STUDENT WHO FAILS THE TEST MUST ALSO BE AFFORDED AN

OPPORTUNITY TO BE RE-EXAMINED. TO BE CONSIDERED VALID FROM A CONSTITUTIONAL STANDPOINT NOT ONLY MUST THE TEST MEASURE THE SKILLS IN THE OFFICIAL CURRICULUM BUT THE MAJORITY OF TEACHERS MUST RECOGNIZE EACH SKILL AS A TEACHING REQUIREMENT.

EQUAL PROTECTION

THE FOURTEENTH AMENDMENT PROHIBITS A STATE FROM DENYING TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW. AN EQUAL PROTECTION CHALLENGE MUST SHOW THAT GROUPS OF PEOPLE ARE BEING TREATED DIFFERENTLY WITHOUT ADEQUATE JUSTIFICATION. IN ANALYZING EQUAL PROTECTION CASES, BOTH THE INTEREST OF THE STATE AND THE INTEREST OF THE INDIVIDUAL ARE EVALUATED. IF THE PERSON'S INTEREST IS A FUNDAMENTAL OR BASIC HUMAN RIGHT AND THERE ARE NO AVAILABLE ALTERNATIVES, THE COURT WILL EXAMINE THE CASE IN DETAIL. THIS IS USUALLY DESCRIBED AS STRICT SCRUTINY. IF THE PERSON'S INTERESTS ARE OF LESSOR IMPORTANCE, THEN THE STATE NEED ONLY PROVE THAT THE CLASSIFICATION IS RATIONAL.

SHOULD THE RESULTS OF THE TEST PLACE A MAJORITY OF BLACKS BELOW THE MINIMUM COMPETENCY LEVEL AND THUS DENY THEM A DIPLOMA, SUCH A SUSPECT CLASS WILL TRIGGER STRICT SCRUTINY. IF THE TEST WAS FOUND TO BE INVALID OR IT FAILED TO MEASURE WHAT WAS TAUGHT THE TEST WOULD PROBABLY BE FOUND TO LACK A RATIONAL BASE. IN EQUAL PROTECTION CASES, IT MAY ALSO BECOME NECESSARY TO PROVE AN INTENT TO DISCRIMINATE.

STATUTES AND REGULATIONS

STATUTES ARE USUALLY CREATED TO PROVIDE STANDARDS MORE PROTECTIVE OR IN GREATER DETAIL THAN THOSE ESTABLISHED IN THE CONSTITUTION. STATUTES OFTEN USED IN THE FIELD OF EDUCATION INCLUDE TITLE VI AND VII OF THE CIVIL RIGHTS ACT OF 1964 AND TITLE IX OF THE EDUCATION AMENDMENTS OF 1972. IN MANY RESPECTS THESE STATUTES RESEMBLE ONE ANOTHER; HOWEVER, THE DECISIONS THAT HAVE RESULTED FROM THEIR USE IN THE COURTS PROVIDE US WITH A NUMBER OF METHODS OF LEGAL ANALYSIS. DUE TO THE SIMILARITY OF THE STATISTICS IT IS POSSIBLE, FOR EXAMPLE, TO EMPLOY THE THINKING OF THE COURT IN A TITLE VI SITUATION TO A TITLE VII SITUATION. THE SAME IS TRUE FOR TITLE IX, HOWEVER, IT IS NOT RELEVANT TO THE TOPIC OF THIS PAPER. THE CIVIL RIGHTS ACT OF 1964 PROHIBITS DISCRIMINATION BASED ON RACE, COLOR, RELIGION OR NATIONAL ORIGIN. TITLE VII IS APPLIED IN THE EMPLOYMENT SITUATION; TITLE VI IS MOST OFTEN APPLIED TO MAXIMUM COMPETENCY TESTING.

TITLE VI STATES, "NO PERSON SHALL, ON THE GROUNDS OF RACE, COLOR OR NATIONAL ORIGIN, BE EXCLUDED FROM PARTICIPATION IN, BE DENIED THE BENEFIT OF, OR BE SUBJECTED TO DISCRIMINATION UNDER ANY PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE." WHILE MOST OF SOCIETY HAS BECOME CONVERSANT WITH THE IDEA OF INTENTIONAL DISCRIMINATION AND HOW SUCH DISCRIMINATION VIOLATES THE CIVIL RIGHTS OF OTHERS MANY DO NOT EITHER UNDERSTAND OR APPRECIATE THE IDEA OF DISPROPORTIONATE IMPACT. IF A TEST IS GIVEN TO A LARGE GROUP OF STUDENTS AND RESULTS OF THE TEST SHOW, THAT AMONG FAILURES, THE PROPORTION OF BLACKS TO WHITES IS FIVE

TO ONE, THE TEST IS SAID TO HAVE A DISPROPORTIONATE IMPACT. EVEN IF THE TEST IS TECHNICALLY SOUND ON ITS FACE IT MAY IN FACT RESULT IN A DISPROPORTIONATE IMPACT. IN ORDER FOR A SCHOOL OFFICIAL TO AVOID JUDGMENT IN THIS SITUATION IT WILL REQUIRE PROOF THAT THE ASSESSMENT HAS BEEN MADE OF LEGITIMATE EDUCATIONAL OBJECTIVES AND THAT THE TEST SELECTED MET ACCEPTABLE STANDARDS FOR VALIDITY, RELIABILITY AND OBJECTIVITY.

ONE OF THE VALUES OF USING A STATUTE RATHER THAN A CONSTITUTIONAL THEORY IS THAT THE CLAIM MAY BE BROUGHT BEFORE AN ADMINISTRATIVE AGENCY RATHER THAN A COURT OF LAW THUS SAVING MONEY. SOME AUTHORITIES ALSO BELIEVE THE CLAIMANT HAS A BETTER CHANCE OF SUCCEEDING. WE, AS EDUCATORS, MUST BE AWARE OF THIS STATUTORY AUTHORITY AS THE LIKELIHOOD OF OUR INVOLVEMENT IS SUBSTANTIAL.

RECOMMENDATIONS

1. MEASUREMENT EXPERTS MUST BECOME INVOLVED IN THE POLITICAL DRAMA DRAFTING COMPETENCY TESTS AND OTHER SCHOOL LEGISLATION. THE PUBLIC MUST BECOME AWARE OF THEIR NEED TO PARTICIPATE IN THE EARLY DISCUSSIONS OF SUCH EDUCATIONAL REGULATORY OR STATUTORY PROCEDURES. IN ALL FAIRNESS TO OUR MEASUREMENT EXPERTS I BELIEVE THIS LEGISLATION HAS BEEN MORE CAREFULLY EXAMINED BY EXPERTS THAN ANY LEGISLATION PREVIOUS TO NOW. WE CERTAINLY HAVE A FAR BETTER UNDERSTANDING OF THE POTENTIAL FUNCTION OF MINIMUM COMPETENCY ASSESSMENT THAN WE HAD OF DESEGREGATION. IN SPITE OF GOOD WORK, IT MAY NOT BE ENOUGH.

2. THE LEGISLATION MUST READ IN SUCH A WAY THAT IT CAN BE USED IN PROBLEM ANALYSIS. CAN THE FOLLOWING BE MEASURED? BY STATUTE, THEY ARE REQUIRED TO, "DEMONSTRATE ABILITY TO SUCCESSFULLY APPLY BASIC SKILLS TO EVERYDAY LIFE SITUATIONS AS MEASURED BY A FUNCTIONAL LITERACY TEST." OR, THE GOAL ADOPTED BY THE OREGON BOARD OF EDUCATION IN 1974. "THAT EACH INDIVIDUAL WILL HAVE THE OPPORTUNITY TO DEVELOP TO THE BEST OF HIS OR HER ABILITY THE KNOWLEDGE, SKILLS AND ATTITUDES NECESSARY TO FUNCTION EFFECTIVELY IN SIX LIFE ROLES: THE INDIVIDUAL, THE LEARNER, THE PRODUCER, THE CITIZEN, THE CONSUMER AND THE FAMILY."¹⁰ OR, THE FOUR GOALS SELECTED BY THE PRINCETON, NEW JERSEY SCHOOL SYSTEM. "OUR CHILDREN SHOULD LEARN TO THINK, COMMUNICATE, COOPERATE AND MAKE REASONED AND WELL-INFORMED DECISIONS."¹¹ LEGISLATION MUST BE CREATED SO THAT IT CAN BE ADDRESSED IN A MEANINGFUL WAY. OUR PUBLIC CAN NOT BE ALLOWED TO CREATE AND IMPLEMENT GOALS, FEW OF WHICH LEND THEMSELVES TO MEASUREMENT?
3. AS EDUCATORS WE MUST CONSIDER THE ISSUE OF FAULTY INSTRUCTION AND HOW IT WILL BE ANALYZED IN COURT. WILL IT BE A CONSTITUTIONAL ISSUE? POSSIBLY EQUAL PROTECTION? WHAT SHOULD A CITIZEN EXPECT FROM HIS/HER EDUCATION? WHAT WILL MALPRACTICE SUITS BE LIKE AND HOW WILL THEY RELATE TO COMPETENCY TESTING? WHAT ARE THE RIGHTS OF FACULTY AND WHOSE RESPONSIBILITY IS IT TO BEGIN TO RESEARCH AND IDENTIFY THOSE RIGHTS?

10. MCCARTHY, MARTHA M. AND PAUL T. DEIGNAN. WHAT LEGALLY CONSTITUTES AN ADEQUATE PUBLIC EDUCATION. BLOOMINGTON, INDIANA: PHI DELTA KAPPA, 1983, P. 63.

11. HOUSTON, PAUL D. "PLANNING FOR LEARNING IN THE WORLD OF TOMORROW," EDUCATIONAL LEADERSHIP, VOL. 41, NO. 1, SEPT. 1983 P. 47. 18

4. WE MUST DETERMINE IF MEASUREMENT EXPERTS HAVE ADEQUATE METHODOLOGY TO ENABLE THE ASSESSMENT OF ACQUIRED BASIC SKILLS? CAN THE INTEGRATION OF THESE SKILLS BE MEASURED? HAVE ADEQUATE RESOURCES BEEN ALLOCATED EXPERTS TO ENABLE THEM TO DEVELOP BEST METHODOLOGIES? IF WE, AS EDUCATORS, BELIEVE WE ARE NOT READY FOR IMPLEMENTATION OF SUCH PROGRAMS WHY HAVE WE NOT SOUGHT INJUNCTIONS TO STOP THE IMPLEMENTATION?
5. WE MUST MOVE RAPIDLY TOWARD A UNITED FRONT ON THE ISSUES OF VALIDITY, AND RELIABILITY?
6. ARE WE HONORING THE NOTICE REQUIREMENTS ESSENTIAL TO A SUCCESSFUL TESTING PROGRAM?
7. METHODS MUST BE DEvised TO INSURE THAT OBJECTIVES TO BE EVALUATED HAVE BEEN INCLUDED IN THE CURRICULUM. WHAT SORT OF LOG OR RUNNING SCHEDULE WILL BEST MEET THIS RECORD KEEPING NEED?
8. DO WE EYEBALL RESULTS OF OUR DATA TO LOOK FOR DISCRIMINATORY IMPACT? MOST OF THE RECOMMENDATIONS MADE SO FAR ARE ESSENTIALS OF A SOUND TESTING PROGRAM. THE EMPHASIS ON EXAMINING THE DATA FOR DISCRIMINATORY PATTERNS IS NOT A FACTOR THAT HAS BEEN GIVEN MUCH CONSIDERATION PRIOR TO NOW.

IN SUMMARY -

YOU CAN EXPECT TO BE IN THE COURTS IN THE NEXT FEW YEARS. IF WE HAVE CAREFULLY PROJECTED OUR GOALS, ANALYZED OUR OBJECTIVES AND PROVIDED A WELL THOUGHT OUT MODEL FOR USE IN DEVISING THE MEASUREMENT TECHNIQUES, THE COURT EXPERIENCE SHOULD BE ROUTINE. OUR FUTURE SUCCESS IN THE AREA OF MEASUREMENT WILL BE IN OUR ABILITY TO WORK AS PART

OF A TEAM, ONE IN WHICH A PHILOSOPHER, A CURRICULAR PLANNER AND YES, MAYBE A CONSTITUTIONAL LAWYER, ASSISTS THE MEASUREMENT SPECIALIST IN DEVISING THE THEORETICAL MODEL.

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